

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
NEW YORK BRANCH OFFICE**

**VERTIS, INC.**

**Employer**

**and**

**Case No. 22-RC-061844**

**LOCAL 1, AMALGAMATED LITHOGRAPHERS  
OF AMERICA, GCC/IBT  
Union**

*Christopher Gant, Esq.*, Counsel  
for the Petitioner  
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**DECISION ON CHALLENGES  
AND OBJECTIONS**

**Statement of the Case**

Raymond P. Green, Administrative Law Judge. I heard this case in Newark, New Jersey, on various days in October and November, 2011.

The Petition in this case was filed on July 28, 2011 and received by the Employer on July 29, 2011.<sup>1</sup> An election, pursuant to a Stipulated Election Agreement, was held on August 31, 2011 and the Tally of Ballots showed that of about 80 eligible voters, 37 cast votes for the Union, 35 cast votes against union representation and two votes were challenged. Therefore, the challenges were sufficient in number to affect the outcome of the election.

On September 7, 2011, both the Employer and the Union filed Objections to the election.

On October 13, 2011, the Regional Director ordered that a hearing be held to resolve the challenged ballots and the Objections.

Based on the record as a whole, including my observation of the demeanor of the witnesses and after considering the arguments of counsel, I hereby make the following;

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<sup>1</sup> The Union's law firm faxed a demand for recognition to the Employer on Friday, July 29, 2011 at 2:58 p.m.

## Findings and Conclusions

### I. The Challenges

The Union challenged the ballots of Frank Swercheck and Luisa A Diaz, contending that these individuals were supervisors within the meaning of Section 2(11) of the Act.

Prior to the filing of the petition, both of these individuals were employed as team leaders, Swercheck in the Finishing Department and Diaz in the Manual Insertion Department. The Stipulated Election Agreement specifically included team leaders as part of the voting unit and both parties agree that people who occupied these positions are not supervisors within the meaning of the Act and are eligible to vote.

On July 29, 2011 the Union faxed a demand for recognition to the employer and this was followed up by the filing of this election petition on August 1, 2011.

On August 1, the Company discharged several of its supervisors including Bill McGuigan, Rob Meyerson and Michelle. Also on that date, employees were notified of these discharges and were either advised that Swercheck and Diaz would be assisting the remaining supervisors or that they were being made interim or temporary supervisors. In Swercheck's case, the Union alleges that he was made the interim Manufacturing Manager, taking over the position previously held by McGuigan. In Diaz's case the Union alleges that she was made the interim Manual Insertion Supervisor to replace Diane Ryder who took over the functions of the discharged Scheduler. The parties stipulated that the positions of Manufacturing Manager and Manual Insertion Supervisor were supervisory positions as defined in Section 2(11) of the Act.

The evidence presented at the hearing does not demonstrate that either Swercheck or Diaz, during the period from August 1 to August 30, ever exercised or were authorized to exercise any of the powers or authorities set forth in Section 2(11) of the Act. Nor do the Company's records show that either received any additional remuneration after July for their alleged added responsibilities. The only evidence to support the Union's contentions is the alleged statements by Paul Sansouci, a company Vice President, at a meeting in early August that Swercheck and Diaz were being assigned to be temporary or interim supervisors.

Swercheck credibly testified that he never had any supervisory functions at any time and that he was not assigned to be an interim or temporary supervisor. Although there was some testimony that Swercheck indicated his interest in getting the promotion, the evidence shows that he did not and that another person, John Geiger, was formally appointed to the supervisory job on August 29, 2011. (Two days before the election).

The testimony of Diane Ryder was that after the discharges on August 1, she remained as the Manual Insertion supervisor but also took on the Scheduler's job as well. As to Diaz, she testified that although Diaz was given more responsibility to oversee the jobs of the other people in the Manual Insertion department, Diaz nevertheless had to obtain Ryder's approval in order to deal with any employee or work related problems. It is true that Diaz ultimately was promoted to the position of Manual Insertion Supervisor but the evidence shows that she applied for this job, which was posted in August 2011, and did not receive the promotion until October 2011, well after the election had been held.

Neither party called Diaz to testify about her job duties. I also note that the Union did not call any employee witness who could testify from personal knowledge about her job duties during the period from August 1 to August 31.

It is settled that the burden of proving supervisory status rests on the party asserting that such status exists. See for example, *Dean & Deluca*, 338 NLRB 1046, 1047 (2003).

Even assuming that employees had been told in early August that Swercheck and Diaz were temporarily assuming supervisory positions, this is, in my opinion, not sufficient to meet the Union's burden of proof. There was no evidence that they actually exercised supervisory authority during the relevant period and there is no evidence that there was any actual change in their official job status or pay. As the parties stipulated that team leaders are eligible to vote and as this was the job position that each had during the critical period, I conclude that their ballots should be opened and counted.<sup>2</sup>

## II. The Objections

### General Principles

In this proceeding each side in support of its objections, has the burden of proof with respect to **(a)** showing that certain specific conduct by agents, or in some cases, other persons, had an undue and adverse impact on the election and **(b)** that the conduct occurred within the time period from the date that the Petition was filed until the date that the election was held. *Ideal Electric Mfg. Co.*, 134 NLRB 1275 (1961).

Further, in order to balance the interests of insuring that employees have a fair chance to express their choice with the requirement that elections have at least a reasonable degree of finality, the Board has explicated a set of standards by which to judge whether conduct, (by either party), will be sufficient to set aside an election. In *Taylor Wharton Harsco Corp.*, 336 NLRB 157, 158 (2001), the Board stated:

[T]he proper test for evaluating conduct of a party is an objective one- whether it has "tendency to interfere with the employees' freedom of choice." *Cambridge Tool Mfg.*, 316 NLRB 716 (1995). In determining whether a party's misconduct has the tendency to interfere with employees' freedom of choice, the Board considers: (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote: and (9) the degree to which the misconduct can be attributed to the party. See e.g., *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986).

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<sup>2</sup> Even if there was some evidence that Diaz and/or Swercheck actually performed supervisory functions during this period, their assignment as "temporary" supervisors would not make them ineligible to vote as it is clear to me that any such assignment was of a limited duration. See for example, *Carlisle Engineered Products Inc.*, 330 NLRB 1359, 1361 (2000). Cf. *E.I. DuPont de Nemours & Co., Inc.*, 210 NLRB 395, 397 (1974).

### **The Employer's Objection No. 1**

The Employer contends that the Union's observer, John Slemmer, at the morning session of the election, loudly announced the names of certain voters when they appeared at the voting area while not announcing the names of others. It claims that this conduct was coercive because the Union's observer was, in effect, announcing to others waiting in line who were union supporters and who were not.

There is really no evidence to support this assertion and this objection is overruled. At most, the evidence shows that Slemmer was the Union's observer and that when some employees entered into the room that was set up to hold the election he simply announced the names of those people he personally knew. I see nothing in this conduct that could conceivably be grounds for setting aside the election.

### **The Employer's Objection No. 2**

The Employer contends that on about August 27, 2011, Slemmer spoke to Swercheck in a threatening manner at the plant in the presence of other employees. It contends that Slemmer shouted that Swercheck was selfish and not interested in what was good for the other employees.

There is no dispute that Slemmer did approach Swercheck a few days before the election and that after Swercheck indicated that he no longer was interested in unionization because the supervisor who persecuted him had been fired, Slemmer stated that Swercheck was selfish and was only interested in himself. Slemmer agrees that there may have been other employees who could have heard this discussion, which he described as being a bit heated and loud. Notwithstanding the fact that there was a brief argument between these two employees, neither of whom were agents of either the Company or Union, this entire transaction simply does not add up to anything of significance. I simply cannot conclude that this event can be grounds for setting aside the election.<sup>3</sup>

### **The Employer's Objection No. 3**

The Employer contend that an employee named Mac Harden harassed Frank Swercheck by making belittling statements about him in an internet chat room and that Harden, in effect, accused Swercheck of changing his mind after signing a union authorization card. The Employer contends that by these and other remarks made in this context, the Union "created an atmosphere of fear and intimidation" among eligible voters.

The remarks made to Swercheck were made in an e-mail exchange after Swercheck announced his resignation from a fantasy baseball league. This objection, on its face, has no merit and it hereby overruled.

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<sup>3</sup> I would not conclude that the statements of Slemmer could constitute objectionable conduct by the Union even if he was an agent of the Union. I note that the fact that Slemmer acted as the Union's election observer on August 31, is not sufficient to make him an agent for any conduct separate and apart from his role as an election observer. As such, Slemmer is construed by me to be a third party whose conduct may not be grounds for setting aside an election unless it was so serious as to make a fair election impossible. *Westwood Horizons Hotel*, 270 NLRB 802 (1984); *U.S. Electrical Motors*, 261 NLRB 1343 (1982); *Phoenix Mechanical*, 303 NLRB 888 (1991); and *O'Brien Memorial*, 310 NLRB 943 (1993). See also *Duralam, Inc.*, 284 NLRB 1419 (1987).

### **The Union's Objection No. 1**

The Union alleges coercion but does not allege any specific conduct. Therefore this objection is overruled.

### **The Union's Objection No. 2**

The Union alleged that the Employer threatened employees that it would not bargain if the Union prevailed in the election.

There is simply no credible evidence to support this contention. At best, the evidence shows that on August 1, 2011, the Employer through its Human Resource Manager, Tami Harper, showed a video to employees that stated in substance that if the Union won the election, there would be bargaining and that there was no guarantee that any terms arrived at in a contract would be better than, the same, or worse than what the employees presently enjoyed. She also credibly testified that she responded to employee questions and never told anyone that if the Union won the election, the Company would refuse to bargain.<sup>4</sup>

### **The Union's Objection No. 3**

The Union alleges that the attorney representing the Employer at the election shouted at and physically attacked a union representative in the presence of eligible voters. In my opinion, the incident as described by witnesses for both parties is insufficient to set aside the election.

Before the afternoon shift of the election, there was some disagreement about the Union's appointment of John Visconte as its afternoon election observer. At one point, there was a short argument between the company lawyer and the Union's business agent. All witnesses agree that there was an extremely brief exchange of angry words and that at most, the company's lawyer may have slightly shoved the union agent or pushed his hand away. This all took place in the room where the election was going to be held and the only employee who was present was the Union's observer who testified that the incident did not affect his vote. There is no evidence that any other employees either witnessed or heard about this incident during the election.

This incident is, in my view, rather minor and was witnessed by only one employee whose vote was not influenced by the incident. I therefore do not believe that it would, by itself or in conjunction with other employer conduct, be sufficient to set aside this election. *Mediplex of Connecticut*, 319 NLRB 281, 297 (1995). Accordingly, this objection is overruled.

### **The Union's Objection No. 4**

The Union alleges that that the Employer engaged in electioneering on the eve of the election when its manager, Steve Flood, told employees at work, that they should vote against the Union.

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<sup>4</sup> Indeed by this time, the Company had recently concluded negotiations after a union certification at another location and had reached a collective bargaining agreement. This fact was made known on the Union's web site and employees could easily have learned of it.

This objection does not allege any type of conduct which under *Peerless Plywood Co.*, 107 NLRB 427 429 (1954), would constitute a captive audience speech given 24 hours before the election. Moreover, even if true, there is nothing in the law that would preclude a supervisor from telling an employee, at work, in a non-coercive manner, that they should vote against a union. As this objection does not allege any conduct that could arguably be the basis for setting aside the election, it is overruled.

#### **The Union's Objection No. 5**

The Union claims that the Employer permitted Laurie Henkel, an anti-union employees, to wear a t-shirt that read; "Common Sense is to Vote No," and that it allowed Henkel to shout at pro-union employees while they were working and during voting hours. The Union further alleges that an employee named Wayne Hawkes shouted to other employees in the pressroom that if the union got in the employees are "going to be screwed." Finally, the Union alleges that on the day of the election, the Employer permitted Henkel and Hawkes to go around the pressroom and tell employees to vote against the Union.

The Union did not present any evidence to show that the Employer allowed employees Henkel and Hawkes to tell employees in the pressroom on the day of the election, to vote against the Union. Nor did the Union present any evidence that the employer allowed Henkel to shout at pro-union employees on the day of the election. As to the other aspects of this objection, the contention boils down to an assertion that two employees who were not agents of the Company publicly expressed their opposition to unionization during working time. The alleged assertions, whether by wearing an anti-union t-shirt or expressing the opinion that employees would "be screwed" if the union won the election, are not impermissible expressions of opinions by third parties. I therefore shall overrule this objection.

#### **The Union's Objection No. 6**

The Union's Objections alleges that on the eve of the election, the Employer posted at its facility, anti-union literature that stated: "Don't vote for the Union; Don't give your pay to Union bosses;" and "If you have a Union, only people with seniority will get promotions."

The Union also points to published statements to the effect that if the Union won the election, the employees would no longer be able to communicate freely with the employer and that employees will lose their direct relationship with the employer and their ability to work with supervisors to flex their work schedules.

The Union introduced into evidence communications made by the Employer to its employees during the election period. I have reviewed these communications and conclude that they constitute typical and unobjectionable campaign propaganda. Clearly the Company asked voters to vote against the Union. Clearly the Company's propaganda emphasized that employees might have to pay union dues. And clearly the Company told employees that with a union contract, it is possible that employees might get preference in promotions based on seniority rather than merit. But nothing in these statements constitute unlawful threats of reprisal.

The Union also contends that certain statements made in the Employer's propaganda informed employees that if the Union was selected, employees would no longer be allowed to engage with their supervisors in relation to work issues such as work schedules. However, these alleged statements make no such absolute assertions and merely advise employees that in a unionized context, employee grievances could be handled by the union and union shop

stewards. In this regard, the statements asserted as objectionable are, in my opinion, simply statements consistent with the law. Pursuant to Section 9 of the Act, although individual employees or groups of employees are entitled to present grievances to management for adjustment, the designated union is required to be given the opportunity to be present at such adjustment and any adjustment cannot be contrary to the terms of a collective bargaining agreement. Therefore, accurate statements made to employees about the relative legal rights of a union *vis a vis* employees and their employer in relation to the conduct of bargaining or the handling of potential grievances, cannot be construed as objectionable. I therefore recommend that this Objection be overruled.

### **The Union's Objection No. 7**

This objection essentially relates to the Union's contention that the Employer during the critical period, promised wage increases in order to persuade employees to vote against the Union.

The facts show, however, that the Company, long before the Union filed the petition, promised to reinstate a merit wage increase program that had been suspended.

The evidence is that since about 2008, the Company has had financial difficulties and has suspended wage increases and other benefits for its employees. This even included at one point a reduction in pay.

At a company wide video presentation to employees on July 13, 2011, the CEO reviewed the Company's operations, progress and continuing problems and promised to reinstate the merit wage increase program in 2012. There was no particular amount promised, albeit the evidence suggests that at least preliminarily, a 3% overall increase was contemplated internally within management. For our purposes, however, the point is that this promised wage increase was made before the Union either demanded recognition or filed its election petition.<sup>5</sup>

This video was replayed to the third shift employees (who hadn't seen it) on August 15, 2011. It was also encored for all the employees at a captive audience meeting held on August 29.

In addition to the above, there was some testimony that an employees named Brian Becker told another employee that the Company was going to give a 5% increase in 2012. There is, however, no evidence that Becker was speaking on behalf of management and his opinion as to the amount of the raise is essentially meaningless.

There is no question but that the Company promised to reinstate the merit wage system in 2012. But this promise was made before the election petition was filed and was made in a context that had nothing to do with a union or union organizing. The video was repeated during the "critical" period and was obviously intended to demonstrate that the Company, without a union, had its employees' interest in mind.

Given the fact that this promise was made before the Company was even aware of union activity, it cannot be said that it was motivated by an intent to influence the employees in choosing or not choosing union representation. Since the promise had already been made

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<sup>5</sup> I note that having reviewed the video, there was no mention at all of unions or union organizing efforts at the Monroe or any other facility.

before the Union appeared on the scene, there can be nothing improper in repeating the promise after the petition was filed and before the election was held. I therefore shall overrule this objection.

#### **The Union's Objection No. 8**

The Union contends that the Employer promised managerial and/or supervisory positions and higher pay to employees if they opposed the Union. Specifically, it contends that Luisa Diaz and Frank Swercheck were made interim supervisors after the commencement of the organizing campaign in exchange for their support for the Company.

In my opinion, the Union failed to present any evidence to support this contention. The evidence does not show that either Swercheck or Diaz were promised anything at all and they essentially remained in their jobs as team leaders during the pre-election period. As noted above, they received no increased remuneration and there is no evidence that they exercised any supervisory authority.

In Swercheck's case, whatever promotion he may have sought was, in fact, given to another person two days before the election. This hardly is consistent with the surmise that he was promised a promotion for his vote. And in the case of Diaz, she did get a promotion in October 2011, well after the election. I therefore, conclude that this objection should be overruled.

#### **The Union's Objection No. 9**

The Union contends that the Employer posted campaign posters that were misleading in relation to which employees were eligible to vote. This contention is simply not correct and the evidence shows that the notices posted described the unit as it was set forth in the Stipulated Election Agreement. Moreover, on the morning of the election, the Company agreed to the Union's request that the unit description, as it appears in the Stipulated Election Agreement, be announced, in Spanish and English, over the public address system. I therefore, shall overrule this objection.

#### **The Union's Objection No. 10**

The Union contends that the Employer's attorney, interrogated employees regarding their union sympathies.

In support of this assertion, a union witness testified that during the conference held before the afternoon election, the company attorney complained that the Union's observer, (Slemmer), had challenged only people who were anti-union votes. He states that when the attorney was asked if he was polling employees, the response was "I'm allowed to talk to my people."

Notwithstanding the statement described above, there is no evidence that the attorney interrogated any eligible employee. Even if I were to conclude that the attorney talked to one or two people during the break between the morning and after sections of the election, there is nothing to indicate that such conversations were not precipitated by employees and not the attorney. Indeed, any such conversation more probably took place between the attorney and the company's observer who was a non-voting employee. I therefore shall overrule this objection.



### **The Union's Objections Nos. 11 and 12**

In these related objections the Union contends that the Employer did not put Anita Patel and other employees in the Quality Control Department on the Excelsior list and that at the election, the employer prevented Patel from entering the voting area to vote.

The Stipulated Election Agreement lists a variety of job classifications that are in the bargaining unit and excludes others. The Quality Control Department is not mentioned either in the inclusions or exclusions. However, the Stipulated Election Agreement after listing a number of exclusions, also states that all other employees are not in the unit.

Initially the Union took the position that the employees in the Quality Control Department should be included in the voting unit. However, as the hearing progressed, the parties stipulated that the intent of the Stipulated Election Agreement was to exclude them.

As a result of the above stipulation, the Employer's omission from the Excelsior List of the quality control department employees was correct and cannot be considered as the basis for overturning the election. Further, although there was no evidence presented to show that Ms. Patel was physically excluded from the voting area, she was not an eligible voter.

Based on the above, I conclude that these objections should be overruled.

In a somewhat related matter, the evidence shows that the team leader of the Quality Control Department, Asif Kahnani, was put on the Excelsior list as an eligible voter. In this regard, Harper testified that this was a mistake. She explained that it may have been that when the list was prepared from the payroll data base, the team leaders were batched together and because team leaders were eligible to vote, it was overlooked that Kahnani was in a department that was excluded from the unit. There is no evidence that the placing of Kahnani's name on the Excelsior List was anything other than a mistake and neither party was even aware of whether he voted.

### **The Union's Thirteen Objection**

The Union contends that the Board agent incorrectly counted a ballot where the voter had marked in the no box; "hell no."

I shall overrule this objection as it is clear that the Board agent correctly counted this ballot. The issue here is whether the voter clearly and unambiguously demonstrated his choice. As there is no possible inference that this vote was ambiguous or that the marking on the ballot was designed or intended to reveal the identity of the voter, the Board agent correctly counted the ballot. *F. Strauss & Son, Inc.*, 195 NLRB 583 fn. 2 (1972).

### **Miscellaneous Contentions**

During the hearing and after reviewing campaign material that had been turned over to the Union pursuant to a subpoena, the Union argued for the first time that the Employer, during the critical period, made other improvements in working conditions and made other direct or implied promises of benefits in order to influence voters. These additional alleged grants or

promises of benefits were not alleged in the Union's objections and were not made part of the Regional Director's Notice of Hearing.<sup>6</sup>

Also, the Union offered evidence that one employee was interrogated by two supervisors during the period of time between the filing of the petition and the holding of the election. This too, was not alleged in the Union's objections and was not made part of the Regional Director's Notice of Hearing.

In my opinion, these additional allegations cannot be the basis for setting aside the election.

In cases involving post-election issues, it is the responsibility of the party alleging misconduct affecting the results of an election to provide sufficient information to the Regional Director to warrant any further action. And in this regard, it is within the Regional Director's discretion to consider evidence that comes to his or her attention even though it may not have been alleged in the objections filed by either a union or an employer. As such, the Regional Director may on his or her own initiative require that a hearing be held to resolve issues that have been discovered during the investigation. *American Safety Equipment*, 234 NLRB 501 (1978),

The same cannot be said for the hearing officer or the Administrative Law Judge who has been designated to conduct the formal hearing. Once a formal hearing has been set the hearing officer is confined to consider only those objections that have been noticed for hearing by the Regional Director. He is not normally permitted to consider allegations other than those put in issue by the Director's Notice of Hearing. *Precision Products Group*, 319 NLRB 640 (1995); *Iowa Lamb Corp.*, 275 NLRB 185 (1985).<sup>7</sup>

The unalleged conduct raised by the Union is not, in my opinion, reasonably related to the objections that were made part of the Notice of Hearing. With respect to alleged promises or grants of benefits, the original union objections made two specific assertions. These were (a) the allegation that the Employer promised to reinstate merit raises and (b) the Employer promised wage increases and promotions to Swercheck and Diaz. Those were the only two such allegations that the Employer was put on notice that would be litigated in this hearing. The newly alleged promises related to completely different matters and were allegedly contained in published propaganda that was viewed by all of the eligible voters before the election. Notwithstanding their widespread publication, the Union did not allege any of these statements as part of its Objections.

Similarly, the alleged interrogation of a single employee by supervisors Steve Flood and John Geiger were not alleged in the original objections and were not noticed for hearing by the Regional Director. The only alleged interrogation that had been noticed for hearing was the alleged interrogation that supposedly was done by the company attorney at the election itself.

<sup>6</sup> Other than the statement that a vote no would give "the Company at least one year to continue demonstrating that Vertis is listening to your needs and addressing your concerns," the Union's Brief does not specify what additional promises were made or what actual benefits were granted.

<sup>7</sup> Although not having the force of precedent, I note that the Board's published Representation Case Manual, at Sections 11392.10, 11392.11 and 11395.3, describes the respective roles of the Regional Director and the Hearing Officer in relation to unalleged objections. At to the latter, the Manual states *inter alia*; "The hearing officer has authority to consider only the issues that are reasonably encompassed within the scope of the specific objections set for hearing by the Regional Director."

The new allegations involve individuals who were never accused previously of having engaged in unlawful interrogation and the transactions described happened at separate times and places.

In support of its contention that these allegations can be the basis for setting aside the election, the Union cites *Sawyer Lumber Co.*, 326 NLRB 1331 (1998); *J&D Transportation*, JD(NY)-27-10 and *Santa Rosa Memorial Hospital*, JD(SF)-18-10. (The latter two being decisions by Administrative Law Judges). In my opinion, these cases are distinguishable.

In *Sawyer Lumber Co.*, the Employer's objections were based on alleged misconduct by the Board agent who conducted the election, including claims that he left the ballot box unattended, allowed observers to take breaks during voting and allowed the Union's observer to talk to voters in the polling area as they waited to vote. At the hearing, there was additional evidence offered to show that the Board agent left blank ballots resting on the table where he and the observers were sitting and, thus, allegedly rendered them subject to tampering. The Board, at footnote 9, upheld the hearing officer's receipt of this evidence even though the conduct was not alleged in the objections because the Board concluded that the evidence was closely related to the objections that were noticed for hearing. In this regard, the asserted conduct was engaged in by the same person who allegedly committed the other objectionable conduct and was done during the same transaction; namely the election itself. I also note that all of the Employer's allegations were overruled on the merits and therefore the Union's objection to the evidence was not prejudicial to it. There was no finding that the unalleged conduct could, by itself, be sufficient grounds for setting aside the election.

In *J&D*, the Administrative Law Judge received, over the Union's objection, certain evidence regarding the Union observer's comments to voters during the election. She concluded that although this alleged conduct was neither alleged in the Employer's objections nor referred to in the Regional Director's Direction of Hearing, the evidence had a sufficient nexus to the objections as filed; in particular, the issues relating to the conduct of the Union's observer during the time that the polls were open. As in *Sawyer*, this additional evidence did not affect the outcome of the case, (and therefore did not prejudice the party objecting to the evidence); inasmuch as the Employer allegations were all overruled and the Judge recommended that the Board issue a Certification of Representative.

In *Santa Rosa Memorial Hospital*, (an interesting case for other reasons), the Administrative Law Judge overruled the Union's objection to the receipt of certain evidence that had not been specifically alleged in the Employer's Objections. This evidence was offered to show that the Board agents conducting the election, "failed to monitor and prevent improper conduct by employees in the voting area." As in *J&D* and *Sawyer*, the unalleged evidence was received because it obviously was closely related to the same transaction and by the same persons who allegedly engaged in the misconduct that was alleged the original objections. Moreover, in this case as well, the receipt of this new evidence did not prejudice the party objecting to the evidence as it did not affect the outcome of the case.

### Conclusions of Law

Based on the above and the record as whole, I conclude that the all of the Objections have no merit and should be dismissed.

I also conclude that Frank Swercheck and Luisa A. Diaz were eligible voters whose challenged ballots should be opened and counted.

**ORDER**

This representation case is remanded to the Regional Director of Region 22, for the purpose of opening and counting the ballots of Frank Swercheck and Luisa A. Diaz, issuing a revised Tally of Ballots and issuing an appropriate Certification.<sup>8</sup>

Dated, Washington, D.C. December 22, 2011

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Raymond P. Green  
Administrative Law Judge

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<sup>8</sup> Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, Exceptions to this Report may be filed with the Board in Washington, DC within 14 days from the date of issuance of this Report and recommendations. Exceptions must be received by the Board in Washington by January 5, 2012.